

**State of California
Energy Resources Conservation
and Development Commission**

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| In the Matter of: |) | Docket: 00-AFC-12 |
| |) | |
| Application for Certification of |) | Staff's Reply Brief on |
| Duke Energy's Morro Bay Power |) | Coastal Act Issues |
| Plant Project |) | |
| _____ |) | February 25, 2004 |

On February 4, 2004, the Morro Bay AFC Committee (Committee) issued a **Notice of Public Hearing and Hearing Order** (Order) for the Morro Bay Power Project (project). That Order addressed a January 13, 2004 filing in this docket by the Executive Director of the California Coastal Commission (Coastal Commission) raising several issues related to the Coastal Commission's recommendations in this proceeding.¹ The Order scheduled a hearing for March 3, 2004, and directed parties wishing to present oral legal arguments at the hearing to file opening briefs on three issues related to the Coastal Commission's recommendations on February 18, 2004, and reply briefs on February 25. This is staff's Reply Brief, addressing the contentions made by Duke Morro Bay, LLC (the applicant) and the City of Morro Bay (City) in their opening briefs.

¹ On December 12, 2002, the Coastal Commission submitted a written report (report) containing an assessment of the conformity of the project with the California Coastal Act (Pub. Resources Code § 30000 et seq.). The report was submitted pursuant to Public Resources Code section 30413(d), which requires the Coastal Commission to participate in siting proceedings of the Energy Commission and provide a written report on the suitability of the site, including an assessment of six specific factors as well as any other matters the Coastal Commission deems appropriate. (Pub. Resources Code § 30413(d) (1) - (7).)

I. The Suitability Report Of the Coastal Commission Should Be Considered In An AFC Proceeding.

As discussed in parties' opening briefs, provisions in the Public Resources Code establish a unique role for the Coastal Commission in the California Energy Commission's (Energy Commission's) licensing process. Under provisions of the Coastal Act², the Coastal Commission is directed to participate in Energy Commission licensing proceedings for projects located in coastal areas and to prepare a written report on the suitability of the project. (Section 30413(d).) The report "shall contain a consideration of, and findings regarding" seven specific issues, including "the conformance of the proposed site and related facilities with certified local coastal programs. . ."

In its opening brief, the applicant repeats an argument it made previously that the report is not relevant to this proceeding. (*See*, January 7, 2003, letter of Christopher T. Ellison to the California Energy Commission.) The basis of this assertion is that Section 30413 requires the Coastal Commission to forward its report to the Energy Commission prior to the completion of the Energy Commission's preliminary report in the Notice of Intention (NOI) process. Therefore, the applicant concludes, the report has no place in an Application for Certification (AFC) proceeding that was not preceded by an NOI. In short, the applicant believes that this language about timing evinces clear legislative

² All subsequent statutory references in this brief are to the Public Resources Code and will be denoted by section number only.

intent to limit the requirement for a Coastal Commission report solely to NOI proceedings.

There are multiple flaws with this argument that lead staff to conclude that it must be rejected. First, the applicant's interpretation of the statutes requires the Energy Commission to ignore express language contained in Section 25523(b). This section directs the Energy Commission to incorporate provisions identified in the Coastal Commission's report for *each* site located within the coastal zone, unless the Energy Commission makes certain findings. Section 25523(b) contains no exemption from this requirement for projects not subject to the NOI proceeding.

Apparently, the applicant believes that where there is no report submitted during an NOI proceeding – because there is no NOI proceeding – the Energy Commission has no responsibility to implement provisions identified by the Coastal Commission as necessary to achieve consistency with the Coastal Act. The applicant claims that its interpretation is supported by the fact that the NOI proceeding -- which is focused on site selection -- is a more appropriate forum for the report than the AFC process. However, the express language of Sections 25523(b) and 30413 belies that claim. It requires the Coastal Commission to specify “the degree to which the proposed site and related facility could reasonably be modified so as to mitigate potential adverse effects on coastal resources. . .” and the Energy Commission to incorporate “specific provisions to meet Coastal Act objectives”. If the Legislature had in fact intended the Coastal

Commission to provide input *only* related to site selection, it would not have directed it to identify specific mitigation measures that are relevant *only* during the AFC proceeding. Similarly, the Legislature would not have mandated that the Energy Commission implement those provisions during the AFC proceeding rather than the NOI proceeding.³

Simply put, the applicant's interpretation makes little sense in light of the express requirements contained in Section 25523(b). Moreover, it would result in the implausible conclusion that the Legislature intended the Coastal Commission to have a less prominent role in a proceeding in which the actual conditions governing design and operation of a coastal facility are determined. Staff recommends that the Energy Commission reject the applicant's arguments on this issue and follow the process identified in Section 25523(b) for addressing the report.

II. The Applicant's Claim That The Conditions Specified By The Coastal Commission Are Irrelevant To The Determination Of Project Consistency With The Coastal Act And LCP Conflicts With The Language Of Public Resources Code Section 25523.

In its brief, the applicant states that the Energy Commission is not bound by the Coastal Commission's findings on project consistency with the Coastal Act and the LCP. The applicant is wrong. (Applicant's Opening Brief, p. 5) Where the Coastal Commission has identified "specific provisions to meet the objectives of [the Coastal Act]", the

³ Public Resources Code section 25514 requires the Energy Commission to include any findings and comments submitted by the Coastal Commission in the final report prepared for an NOI.

Energy Commission cannot independently determine that those provisions are not necessary for consistency. In fact, Section 25523(b) *requires* that such provisions be included in the Energy Commission's final decision unless the Energy Commission makes certain findings regarding environmental harm or infeasibility. It does not permit the Energy Commission to second-guess the Coastal Commission's determination and find that the project would be consistent without those provisions.

The applicant seems to be implying that the phrase in Section 25523(b) "specific provisions to meet the objectives of the [Coastal Act]" refers only to the Coastal Commission's conclusions about what provisions are necessary to ensure consistency, and not whether the project is, in fact, consistent. However, this convoluted reading of uncomplicated language could lead to absurd results. If, as the applicant argues, the Coastal Commission's consistency determination is non-binding, then Section 25523 *requires* the Energy Commission to include the Coastal Commission provisions that are feasible and do not create greater environmental harm in its decision -- even though it may have determined the provisions are *not* necessary to achieve consistency with the Coastal Act or an LCP. Staff believes an interpretation requiring imposition of provisions which are not needed to achieve Coastal Act or LCP consistency is illogical, and was not the intent of the Legislature. The only tenable conclusion is that where the Coastal Commission has identified provisions necessary to achieve Coastal Act and

LCP consistency, the Energy Commission can not determine that the project is consistent without those provisions.⁴

III. The Timing Of Submission Of The Coastal Commission's Report Has Not Denied The Applicant The Opportunity To Comment On The Report To The Energy Commission.

The applicant also claims that Energy Commission consideration of the Report has denied the applicant a "mandated" opportunity to provide comment on the report, as there has been no hearing on the report. Staff notes that when we addressed this issue on our February 6, 2003 response to the applicant's letter to the Energy Commission about the report, we concluded that the simplest way to address this issue would be to re-open the record for the limited purpose of accepting the report.⁵ However, the Committee declined to do so and instead, on February 20, 2003, took official notice of the report.

Although staff agrees that the statute directs the report to be submitted prior to an Energy Commission hearing, we note that in fact, the applicant has already had several

⁴ Both the applicant and the City state that the Energy Commission should adopt the City's determination about LCP consistency. As stated above, staff believes that the Coastal Commission finding that additional provisions are necessary to achieve LCP conformity is binding on the Energy Commission. However, if the Energy Commission were to reject that position, we note that in the absence of Energy Commission jurisdiction, it is the Coastal Commission - not the City - that has the final say in the event of a disagreement about LCP conformity. (Section 30603) Therefore, the Coastal Commission's determination about the project's consistency is entitled to much greater weight than that of the City.

⁵ We note that a review of the November 5, 2002 transcript indicates that the Committee did not expressly close the record at the conclusion of hearings. However, we believe the parties understood that that was the Committee's intention and therefore treat the record as closed for purposes of this Motion.

opportunities to identify its concerns about the report. Most significantly, it appeared at the December 12, 2002 public hearing at which the Coastal Commission adopted the report and presented its comments about the report. In addition, in its January 7, 2004 letter to the Energy Commission, the applicant identified a number of specific concerns about the report. Moreover, the subject of the Coastal Commission's report was the subject of workshops and hearings in the AFC process for more than one year. Staff still believes that re-opening the record to receive the report would be a simple and effective way to address the applicant's concerns. But if the Committees decide not to do so, the applicant has already had a number of opportunities to express its concerns about the report to the Committee.

IV. The Commission Should Consider Whether It Can Make The Findings Identified In Section 25525 With Respect To the Project's Lack Of Conformity With The Coastal Act And LCP Policies.

The applicant argues that Section 25525 does not address the Energy Commission's responsibilities with respect to the provisions identified in the Coastal Commission report. (Applicant's Opening Brief, p. 16) Staff agrees with the applicant that the relationship of Section 25525 and 25523(b) is ambiguous. However, because the failure to implement provisions identified by the Coastal Commission in its report necessarily raises the issue of Coastal Act or LCP non-conformity, one could argue that the applicant's interpretation would result in a lower standard being applied to Energy Commission consideration of an override of Coastal Act or LCP non-conformities than

non-conformities with other local or state laws or standards. This result seems contrary to the important role that coastal protection plays in California's laws.

However, because the applicant does not object to the Energy Commission considering adoption of override findings pursuant to Section 25525 in this case, the Energy Commission does not need to resolve this issue. We therefore recommend that prior to licensing this project, the Energy Commission determine whether the project is needed for public convenience and necessity and whether there are more prudent and feasible means of achieving such public convenience and necessity.

Date: February 25, 2004

Respectfully submitted,

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